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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Salt River Pima-Maricopa Indian) No. CV-08-1005-PHX-ROS
Community, et al.,)

10 Plaintiffs,)

11 vs.)

12)
13 United States of America, et al.)

14 Defendants.)
15

ORDER

16
17 **Procedural History**

18 On May 30, 2008 the Salt River Pima-Maricopa Indian Community and various
19 Community members (Plaintiffs/Counterdefendants) filed a tort class action against the
20 United States and its officers (Defendants/Counterclaimants) relating to the unauthorized
21 presence of federal power lines on Plaintiffs' property, seeking monetary, declaratory and
22 injunctive relief (Doc. 1).¹ On August 11, 2008 Defendants filed a Motion to Stay
23 Proceedings, pending the outcome of a related action for breach of contract before the
24 Federal Court of Claims (Docs. 21-22). On October 27, 2008 the Motion was denied and
25 Defendants were ordered to file an Answer (Doc. 29). On November 5, 2008 Defendants
26 filed an Answer and Counterclaim requesting equitable relief against Plaintiffs (Doc. 32).
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28 ¹The Complaint was amended on July 28, 2008 (Doc. 17).

1 On November 25, 2008 Plaintiffs filed a Motion to Dismiss Counterclaim pursuant to Federal
2 Rule of Civil Procedure 12(b)(6) (Docs. 39-40). On December 12, 2008 Defendants
3 responded and, on December 31, 2008, Plaintiffs replied (Docs. 47, 50). Before the Court
4 is Plaintiffs' Motion to Dismiss, which will be granted.

5 6 **Background**

7 On October 28, 1942 Congress enacted Public Law 764, authorizing the Secretary of
8 the Department of the Interior ("Secretary") to designate Indian lands necessary for the
9 completion of the Parker Dam power project, including placement of electric transmission
10 lines, and to acquire such lands for the United States in exchange for just compensation (Doc.
11 47 Ex. A). See Act of Oct. 28, 1942, ch. 630, 56 Stat. 1011, Pub. L. No. 77-764. On
12 February 5, 1948, Congress enacted the Indian Right-of-Way Act ("IRWA"), which
13 established certain criteria for granting rights-of-way across Indian lands and otherwise
14 authorized the Secretary to regulate the creation of easements on Indian reservations. IRWA
15 became effective thirty days after enactment (Doc. 40 Ex. 3).

16 On March 5, 1948 the Community Council of Plaintiff Salt River Pima-Maricopa
17 Indian Community ("SRPMIC") authorized the Department of the Interior Bureau of
18 Reclamation ("BOR") to enter the SRPMIC reservation to conduct surveys related to the
19 placement of Parker Dam power project transmission lines. The authorization was granted
20 with the understanding that BOR, upon deciding to construct transmission lines on the
21 reservation, would apply for an easement "in the usual manner" and compensate SRPMIC
22 for both land use and property damage caused by construction and surveying (Doc. 40 Ex.
23 1). On August 1, 1949 BOR executed a Contract and Grant of Easement with owners of
24 certain allotted lands on the SRPMIC reservation for the purpose of transmission line
25 construction (Doc. 40 Ex. 2). On September 21, 1949 the SRPMIC Community Council,
26 noting BOR's pending application for an easement with the Department of the Interior
27 Bureau of Indian Affairs ("BIA"), authorized construction of the transmission lines (Doc. 47
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1 Ex. D). The duration of the agreed-upon easement is not discussed in any of the above-
2 referenced documents.

3 On March 29, 1950 the Secretary provisionally authorized BOR to begin construction
4 of transmission lines on the SRPMIC reservation, noting that a permanent easement had not
5 yet been approved (Doc. 40 Ex. 5). On August 10, 1951 the Secretary promulgated
6 regulations for IRWA and set a fifty-year limitation on specified easements across Indian
7 lands, including those for electric transmission lines (Doc. 40 Ex. 6). On December 17, 1951
8 the BIA Commissioner (“Commissioner”) approved BOR’s easement application, restricting
9 the easement to fifty years in accordance with the new regulations (Doc. 40 Ex. 7-8). On
10 October 31, 2007 SRPMIC President Diane Enos notified Defendants of the expiration of the
11 BOR easement and presented Plaintiffs’ claim for damages (Docs. 1 Ex. 1; 30 Ex. 1). On
12 May 30, 2008, Plaintiffs filed suit (Doc. 1).

14 Discussion

15 A. Standard

16 A motion to dismiss a counterclaim pursuant to Federal Rule of Civil Procedure
17 12(b)(6) (“Rule 12(b)(6)”) is judged by the same standard as a motion to dismiss a claim.²
18 Accordingly, a court’s inquiry “is limited to the allegations in the [counter-]complaint, which
19 are accepted as true and construed in the light most favorable to the plaintiff.” Lazy Y Ranch
20 Ltd. v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008); see also Aagard v. Palomar Builders,
21 Inc., 344 F. Supp. 2d 1211, 1214 (E.D. Cal. 2004) (“On a motion to dismiss, the allegations
22 of the counter complaint must be accepted as true . . . the counter complaint is construed
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24 ²See e.g. Penn. R.R. Co. v. Musante-Phillips, Inc., 42 F. Supp. 340, 341 (N.D. Cal. 1941)
25 (“[I]t is incumbent upon the court to sustain a complaint if there is any possible theory upon which
26 liability can be based . . . Obviously, this doctrine must apply to counterclaims.”); Res. Lenders, Inc.
27 v. Source Solutions, Inc., 2005 WL 3525670, *3 (E.D. Cal. 2005) (“A motion to dismiss a
28 counterclaim for failure to state a claim is evaluated in the same manner as a motion to dismiss a
complaint under Rule 12(b)(6).”); In re Acacia Media Tech.’s Corp., 2005 WL 1683660, *3 (N.D.
Cal. 2005) (same).

favorably to the pleader”). However, a court “need not accept as true allegations contradicting documents that are referenced in the [counter-]complaint or that are properly subject to judicial notice.” Lazy Y Ranch Ltd., 546 F.3d at 588. Consideration of materials incorporated by reference in the counter-complaint is permitted when “plaintiff’s claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document.” Knieval v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005). The counterdefendant bears the burden of proving the counterclaimant fails to state a claim. See e.g. Hedges v. U.S., 404 F.3d 744, 750 (3d Cir. 2005); Bangura v. Hansen, 434 F.3d 487, 498 (6th Cir. 2006); James Wm. Moore, 2 Moore’s Federal Practice § 12.34[1][a] at 12-73 (2008 ed.).

B. Counterclaim

Defendants allege the easement approved by the Commissioner on December 17, 1951 did not conform to the intent of the parties, as expressed by the prior agreements, or to the intent of Congress, as expressed by Public Law 764. Defendants specifically allege the Commissioner erred by incorporating a fifty-year duration into the easement, which, according to Defendants, was intended by both Congress and the parties to last in perpetuity (Doc. 32 at 11-13). Defendants thus seek to equitably reform the easement to last in perpetuity (Doc. 32 at 13).³

³ The doctrine of equitable reformation appears to be properly pled in the Counterclaim. Federal common law governs Indian land disputes and a number of recent opinions have applied equitable doctrines, including reformation, to such cases. See County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 233-36 (1985) (absent a governing statute or treaty, federal common law governs “aboriginal land rights”); see also e.g. Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1341 & n.11a (10th Cir. 1982) (upholding the application of federal common law and equitable tolling to a lease between an Indian lessor and a third-party lessee); Oneida Indian Nation of N.Y. v. N.Y., 500 F. Supp. 2d 128, 139 (N.D. N.Y. 2007) (upholding against summary judgment a claim for equitable reformation of a land contract between an Indian Tribe and a State). Moreover, the Counterclaim fits with the doctrine, which is defined under federal law as:

[A]n equitable remedy by which a written instrument is made or construed to express the real intention of the parties when some error or mistake has been committed. Equity has power to reform and

1 **C. Motion to Dismiss**

2 Plaintiffs seek dismissal of the Counter-complaint for failure to state a claim, arguing
3 reformation would violate the 1951 IRWA regulations' fifty-year limitation on transmission
4 line easements across Indian lands. Plaintiffs are correct that the doctrine of equitable
5 reformation may not be invoked to reform an agreement into one which contravenes public
6 policy, including current law or the law at the time the agreement was formed. See Hedges
7 v. Dixon County, 150 U.S. 182, 192 (1893) (“[E]quity follows the law . . . wherever the
8 rights or the situation of parties are clearly defined and established by law, equity has no
9 power to change or unsettle those rights or that situation”) (internal citation omitted); see also
10 e.g. Trowell v. S. Fin. Group, Inc., 2008 WL 4787142, *2 (11th Cir. 2008) (*per curiam*) (“A
11 court cannot give effect to a proposed reformation that would result in an invalid or illegal
12 contract.”) (citing Hedges, 150 U.S. at 192).

13 Defendants do not contest that the 1951 IRWA regulations limited to fifty years the
14 duration of transmission line easements across Indian lands. Nor do Defendants contest that
15 the easement at issue was finalized by the Commissioner on December 17, 1951 (Doc. 32 at
16 11). Instead, Defendants argue the proposed reformation would not violate public policy
17 because the 1951 regulations were inapplicable to the easement. Specifically, Defendants
18 contend their right to the easement vested upon enactment of Public Law 764, in 1942, prior
19 to promulgation of the 1951 regulations. Defendants also contend, because IRWA did not
20 repeal Public Law 764, any portion of the 1951 regulations inconsistent with Public Law 764,
21 including the fifty-year limitation, did not apply to the easement. The question presented is

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24 correct a valid written instrument to make it conform to the
25 agreement actually made. A proceeding to reform a contract
26 presupposes that the instrument does not express the true intent of the
27 parties. It contemplates a continuance of the contractual relation. Its
28 purpose is not to make a new contract but to give effect to the
original intent of the parties.

N. Pac. Ry. Co. v. U.S., 70 F. Supp. 836, 866 (D. Minn. 1946) (citing
Bartelme v. Merced Irrigation Dist., 31 F.2d 10 (9th Cir. 1929)).

1 whether the 1951 regulations apply to the easement and render Defendants' proposed
2 reformation illegal. Defendants advance two arguments.

3 **1. Date of Easement's Vesting**

4 Defendants argue the 1951 regulations were inapplicable to the easement because
5 Defendants' right to the easement vested in 1942, upon enactment of Public Law 764. Public
6 Law 764, however, did not identify any particular parcel or allotment, but rather "granted to
7 the United States . . . [s]uch right, title, and interest of the Indians as may be required in and
8 to such tribal and allotted lands as may be designated by the Secretary of the Interior from
9 time to time for the construction, operation, and maintenance of electric transmission lines
10 and other works of the project" (Doc. 47 Ex. A). Pub. L. No. 77-764 § 1. To interpret Public
11 Law 764 as vesting the easement upon enactment, Defendants rely on the doctrine of *in*
12 *praesenti* land grants.

13 An *in praesenti* land grant occurs when Congress authorizes the disposition of federal
14 land to a third party in exchange for a condition precedent act, such as the construction of a
15 railroad track or electric transmission line. The grant is one of unfixed location and the
16 specific parcels within the grant are determined by the completion of the condition precedent
17 act (e.g. when the grantee lays the railroad track or builds the transmission lines, all land
18 beneath the track or line becomes part of the grant). In this way, the particular contours of
19 the grant are chosen by the grantee. Once the act is completed, satisfaction of the condition
20 precedent must be verified by a government agent. Upon verification, the land encompassed
21 within the grant becomes fixed and vests to the grantee, relating back to the date of the initial
22 Congressional enactment. See *S. Pac. Transp. Co. v. Watt*, 700 F.2d 550, 555 (9th Cir.
23 1983).

24 Defendants argue Public Law 764 is analogous to a number of statutes interpreted by
25 the Supreme Court to be *in praesenti* grants and thus the easement in this case, although
26 finalized in 1951, was granted *in praesenti*, vesting retroactively in 1942. The Court
27 disagrees. Defendants' analogy rests on the fact that the cited statutes and Public Law 764
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1 share similar statutory language, such as the phrase “is hereby granted.” See e.g. Mo., Kan.,
2 & Tex. Ry. Co. v. Kan. Pac. Ry. Co., 97 U.S. 491, 496 (1878) (“Its language is, ‘that there
3 be and is hereby granted’ . . . words which import a grant *in praesenti* and not one *in futuro*”)
4 (citing Act of Jul. 1, 1862, ch. 70, 12 Stat. 489 at § 2); Leavenworth, Lawrence & Galveston
5 R.R. Co. v. U.S., 92 U.S. 733, 741 (1875) (“‘There be and is hereby granted’ are words of
6 absolute donation, and import a grant *in praesenti*.”) (citing Act of Mar. 3, 1863, ch. 48, 12
7 Stat. 772 at § 1); see also Pub. L. No. 77-764 at § 1 (“That in aid of the construction of the
8 Parker Dam power project, there is hereby granted to the United States . . .”). However, the
9 use of magic words, without more, is insufficient to create an *in praesenti* grant. The
10 unspoken assumption in Defendants’ cited cases, which led the Supreme Court to conclude
11 the phrase “is hereby granted” connoted an *in praesenti* grant, was that the grantee was a
12 railroad company. See N.Y. Indians v. U.S., 170 U.S. 1, 17 (1898) (“In the cases arising
13 under the railroad land grants . . . language of the granting clause was in the present tense,
14 ‘there be, and hereby is, granted,’ etc.; and it has always been held that these grants were in
15 praesenti”) (citing Mo., Kan., & Tex. Ry. Co. and Leavenworth, Lawrence & Galveston R.R.
16 Co.). The grantee in this case is not a railroad. Although grants to non-railroads have been
17 found to be *in praesenti*, such a determination must rest on the structure of the grant, not
18 particular words or phrases found in the statute.

19 As discussed above, *in praesenti* grants involve unfixed land grants conditioned on
20 the completion of a precedent act. In completing the act, the grantee chooses the parcels to
21 be included within the grant. Upon completing the act, the condition precedent is verified
22 by a government agent and fixed title in the chosen parcels vests to the grantee, relating back
23 to the date of the original Congressional enactment. See S. Pac. Transp. Co., 700 F.2d at
24 555. The statutes in Defendants’ cited cases offer clear examples of this structure.⁴ Public
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26 ⁴ See e.g. Act of Jul. 1, 1862, ch. 70, 12 Stat. 489 at §§ 2, 4 (“That the right of way through
27 the public lands be, and the same is hereby, granted to said company for the construction of said
28 railroad and telegraph line; and the right, power, and authority is hereby given to said company to
take from the public lands adjacent to the line of said road . . . [W]hensoever said company shall have

1 Law 764, however, does not. While Public Law 764 establishes an unfixed grant of land to
2 BOR and the Parker Dam power project, neither grantee has the authority to choose the
3 parcels within the grant but rather the Secretary designates the scope of the grant. See Pub.
4 L. No. 77-764 at § 1 (“[T]here is hereby granted to the United States . . . right, title, and
5 interest of the Indians as may be required in and to such tribal and allotted lands *as may be*
6 *designated by the Secretary of the Interior*”) (emphasis added). Moreover, there is no
7 condition precedent to satisfy or ministerial verification process; the Secretary discretionarily
8 designates grant lands “from time to time” and is otherwise “authorized to perform any and
9 all acts . . . to carry out the provisions of this Act.” Id. at §§ 1, 4.

10 Contrary to Defendants’ argument, the structure of Public Law 764 bears little
11 resemblance to an *in praesenti* grant. Instead, Public Law 764 appears to be part of a
12 patchwork scheme, scheduled to occur over an extended period of time, in which the
13 Secretary was directed to transfer land at his discretion from affected Indians to BOR and the
14 Parker Dam power project, in exchange for just compensation, and title was meant to vest
15 with BOR and Parker Dam upon completion of each transaction. This reading of Public Law
16 764 is supported by at least one other district court, which interpreted the statute not as a large

18 completed forty consecutive miles of any portion of said railroad and telegraph line . . . the President
19 of the United States shall appoint three commissioners to examine the same and report to him in
20 relation thereto; and if it shall appear to him that forty consecutive miles of said railroad and
21 telegraph line have been completed and equipped in all respects as required by this act, then . . .
22 patents shall issue conveying the right and title to said lands to said company, on each side of the
23 road as far as the same is completed”) (interpreted in Mo., Kan., & Tex. Ry. Co., 97 U.S. at 496);
24 Act of Mar. 3, 1875, ch. 152, 18 Stat. 482 at §§ 1, 4 (“That the right of way through the public lands
25 of the United States is hereby granted to any railroad company duly organized under the laws of any
26 State or Territory . . . That any railroad-company desiring to secure the benefits of this act, shall,
27 within twelve months after the location of any section of twenty miles of its road . . . file with the
28 register of the land office for the district where such land is located a profile of its road; and upon
approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office;
and thereafter all such lands over which such right of way shall pass shall be disposed of subject to
such right of way”) (interpreted in Great N. Ry. Co. v. U.S., 315 U.S. 262, 272 n.4 (1942)); see also
e.g. U.S. v. Magnolia Petroleum Co., 110 F.2d 212, 216-18 (10th Cir. 1939) (interpreting Act of Feb.
28, 1902, ch. 134, 32 Stat. 43 at §§ 13, 15).

1 grant of land effective upon satisfaction of a condition precedent, but rather as an enabling
2 statute which conferred upon the Secretary authority to acquire title to Indian lands at his
3 discretion. See Quechan Indian Tribe v. U.S., 535 F. Supp. 2d 1072, 1092 (S.D. Cal. 2008)
4 (“Because the Court finds the 1942 Act authorized the Secretary to divest the Tribe of its
5 interest in its land, the Court must now look to the language of the Secretarial Determination
6 to ascertain whether the Secretary did, in fact, divest the Tribe of its interests.”). Accordingly,
7 Defendants’ argument is rejected.

8 **2. Public Law 764 – IRWA Conflict**

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10 Defendants next argue the 1951 IRWA regulations’ fifty-year limitation was
11 inapplicable to the easement because: (1) the easement was authorized by Public Law 764,
12 which was not expressly repealed by IRWA; (2) Public Law 764 conflicted with IRWA by
13 requiring easements in perpetuity; and thus (3) Public Law 764, not IRWA, was the
14 controlling statute with respect to easement duration. Defendants are correct that IRWA did
15 not repeal Public Law 764 and was designed to supplement rather than displace prior special
16 legislation which had granted easements across Indian lands. See Neb. Pub. Power Dist. v.
17 100.95 Acres of Land in County of Thurston, 719 F.2d 956, 959 (8th Cir. 1983) (“[T]he
18 explanation of this provision does suggest a general intent in the 1948 Act [IRWA] of adding
19 to, rather than replacing, existing legislation concerning rights-of-way across Indian lands.”);
20 Blackfeet Indian Tribe v. Mont. Power Co., 838 F.2d 1055, 1058-59 (9th Cir. 1988) (adopting
21 Neb. Pub. Power Dist.’s analysis concerning IRWA’s interplay with prior easement statutes).
22 However, the Court disagrees that IRWA and Public Law 764 conflicted.

23 Defendants contend the statute and regulation are in conflict because the 1951 IRWA
24 regulations limited transmission line easements to fifty-years while Public Law 764 required
25 perpetual easements. However, Public Law 764, on its face, is silent concerning the question
26 of easement duration. In support, Defendants compare Public Law 764 to a 1911 statute,
27 which expressly limited easements across Indian lands to fifty years, and argue Congress
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1 knew how to limit easement duration when it desired (Doc. 47 at 4). See 43 U.S.C. § 961.
2 Defendants also cite the common historical usage of perpetual easements and the fact that
3 before 1875 all rights-of-way across Indian lands were granted in fee simple (Doc. 47 at 5-6
4 & n.4). Essentially, Defendants infer from Congressional silence that Public Law 764
5 intended the granting of perpetual easements. Although reasonable, this position is less
6 persuasive than the authority supporting Plaintiffs' position, that Congress intended for the
7 Secretary to determine the nature and duration of easements procured under Public Law 764
8 and the fifty-year limit promulgated in the 1951 IRWA regulations was a valid exercise of
9 such discretion.

10 First, it is noted that some measure of deference is owed to Plaintiff's position because
11 it was adopted by the Department of the Interior ("DOI"), the agency charged with the
12 administration of Public Law 764. Although DOI never released an official interpretation
13 reconciling Public Law 764 and IRWA, internal DOI communications (including one
14 authored by the Secretary) strongly suggest DOI policy was to interpret Public Law 764 as
15 incorporating the 1951 IRWA regulations.⁵ See U.S. v. Mead Corp., 533 U.S. 218, 228
16 (2001) ("The fair measure of deference to an agency administering its own statute has been
17 understood to vary with circumstances, and courts have looked to the degree of the agency's
18 care, its consistency, formality, and relative expertness") (footnotes omitted); Reno v.
19 Koray, 515 U.S. 50, 61 (1995) (An "internal agency guideline, which is akin to an interpretive
20 rule that does not require notice and comment . . . is still entitled to some deference") (cited
21 in Meade, 533 U.S. at 228 n.9); see also Pub. L. No. 77-764 at § 4 ("The Secretary of the
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24 ⁵ Plaintiffs provide two letters, one from the Secretary to the Commissioner of BOR dated
25 March 29, 1950 and a second from the BIA Land Branch Chief to the BIA Commissioner dated
26 December 7, 1951, both of which affirm that the requirements of IRWA were applicable to
27 easements granted under Public Law 764 (Doc. 40 Ex. 5, 7). The second letter explicitly opines the
28 1951 IRWA regulations, including the fifty-year limitation, are applicable to easements procured
under Public Law 764 (Doc. 40 Ex. 7). The Commissioner's December 17, 1951 approval of the
easement, with a fifty-year limitation, appears to have resulted from the second letter (Doc. 40 Ex.
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1 Interior is hereby authorized to perform any and all acts and *to prescribe such regulations* as
2 he may deem appropriate to carry out the provisions of this Act.”) (emphasis added).

3 Plaintiffs’ interpretation of Public Law 764 as not requiring permanent easements is
4 also more consistent with both the text of the statute and Congressional Indian policy at the
5 time of enactment. With respect to the text, the statute vests interpretive authority with the
6 Secretary and is silent on the question of easement duration, indicating Congress intended for
7 the Secretary to resolve any ambiguities in the text, including easement duration. See Pub.
8 L. No. 77-764 at § 4 (“The Secretary of the Interior is hereby authorized to perform any and
9 all acts and to prescribe such regulations as he may deem appropriate to carry out the
10 provisions of this Act.”); Meade Corp., 533 U.S. at 229 (Congressional intent to delegate
11 authority to fill in the interstices of a statute is strongly implied when Congress confers rule-
12 making authority to an administrative agency). With respect to Congressional Indian policy,
13 Public Law 764 followed on the heels of the Indian Reorganization Act of 1934, which
14 “reflected a new policy of the Federal Government . . . aimed to put a halt to the loss of tribal
15 lands.” Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151 (1973); accord Babbitt Ford,
16 Inc. v. Navajo Indian Tribe, 710 F.2d 587, 599 n.14 (9th Cir. 1983). Although the primary
17 cause of land loss which concerned Congress when enacting the Indian Reorganization Act
18 appears to be allotment, Congress’ desire to deal more fairly with Indians and preserve Indian
19 land rights would logically have extended to other forms of land loss, such as through the
20 imposition of permanent servitudes.

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22 In this way, Plaintiffs have the better argument, that Public Law 764 did not require
23 the granting of permanent easements and there was no conflict between Public Law 764 and
24 IRWA concerning easement duration which caused IRWA’s fifty-year limitation to be
25 inapplicable to the easement. Accordingly, Defendants’ argument is rejected.

26 Plaintiffs have thus met the burden of showing that Defendants’ interpretation of Public
27 Law 764 is incorrect, that the statute neither legislated an *in praesenti* grant nor mandated
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1 permanent easements contrary to IRWA. Accordingly, the 1951 IRWA regulations were
2 applicable to the easement and Defendants' requested equitable reformation will be dismissed
3 for proposing an easement that would have been illegal at the time of formation.


4 Accordingly,

5 **IT IS ORDERED** Plaintiffs' Motion to Dismiss (Doc. 39) **IS GRANTED**.

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7 **FURTHER ORDERED** Defendants' Counterclaim (Doc. 32) **IS DISMISSED**.

8 DATED this 3rd day of September, 2009.
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Roslyn O. Silver
United States District Judge